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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

HANS HOLMGREN,

Defendant and Appellant.

2d Crim. No. B205684
(Super. Ct. No. F410869)
(San Luis Obispo County)

Hans Holmgren appeals the denial of his petition contesting the determination that he qualifies as a mentally disordered offender (MDO). (Pen. Code,¹ § 2962.) He contends the evidence is insufficient to support the finding that he had been in treatment for at least 90 days within the year prior to his parole release date (§ 2962, subd. (c)). We affirm.

FACTS AND PROCEDURAL HISTORY

In 2002, Holmgren was convicted of committing lewd acts on a child under the age of 14 (§ 288, subd. (a)) and was sentenced to state prison. On November 11, 2007, prior to his release on parole, the Board of Prison Terms (BPT) certified him for treatment as an MDO. On November 26, 2007, Holmgren filed a petition in the superior

¹ All further statutory references are to the Penal Code.

court challenging the BPT's determination. He was subsequently appointed counsel and waived his right to a jury trial on the petition.

Trial was held on January 15, 2008. Dr. Brandon Yakush, a psychologist at Atascadero State Hospital who evaluated Holmgren, testified that he met all of the MDO criteria. Dr. Yakush concluded that while Holmgren suffered from both a psychotic disorder and pedophilia, the pedophilia was the sole cause and aggravating factor in his commission of the controlling offense. The doctor also concluded that Holmgren's pedophilia was not in remission, and that he had received at least 90 days of treatment for the disorder during the year prior to his parole release date. Dr. Yakush further found that Holmgren represented a substantial danger of physical harm to others by reason of his pedophilia, based in large part on Holmgren's admission to the police that he would reoffend.

The parties stipulated to the admission of evaluation reports prepared by two psychologists who had interviewed Holmgren. Dr. Phillip S. Trompetter concluded that Holmgren suffered from schizophrenia, probably paranoid type, which qualifies as a severe mental disorder under section 2962. The doctor noted that Holmgren had consistently been diagnosed with schizoaffective disorder, bipolar type, for which he had received treatment in the form of medication and talk therapy. Holmgren had been experiencing auditory hallucinations since the age of 11. Holmgren had previously reported that the voice had "power over" him and told him to "deny Christ and commit suicide." While Holmgren told Dr. Trompetter that he was "troubled by his sexual impulses," he denied any sexual attraction toward prepubescent males and indicated that "[h]e generally tries to avoid thinking or imagining about sexuality altogether as a way of coping with his conflict." Based on these statements, the doctor concluded that Holmgren "does not provide sufficient evidence to diagnose him with a Paraphilia, and, but for his controlling case offense, there is no evidence of Pedophilia." Dr. Trompetter further found that Holmgren's schizophrenia was not a cause or aggravating factor in his commission of the controlling offense, primarily because he "did not engage in any

bizarre or grossly psychotic-like behavior at the time of his sex offenses" and did not "exhibit behavior that indicated he did not comprehend the situation" after he turned himself in to the police. The doctor also noted that Holmgren "reported that he was experiencing auditory hallucinations at the time of his controlling case offense but added, 'the voice did not make me do it – it said how I could prevent myself from doing it. It had no effect. It was just there.'" Dr. Trompetter found this report "to be credible." The doctor also found that Holmgren's schizophrenia was not in remission and that he had received at least 90 days of treatment in the year preceding his parole release date, yet concluded that he did not presently represent a substantial danger of harm to others as a result of the disorder.

Dr. Barbara P. Stark concluded that Holmgren met all of the MDO criteria. Holmgren was diagnosed as suffering from schizoaffective disorder, bipolar type, and pedophilia with a primary attraction to males. Dr. Stark noted that "[t]he patient's etiology of a severe mental illness is complex and includes elements of severe psychological trauma and violence and a family history of mental illness." Holmgren had been treated by numerous psychiatrists and psychologists since the age of 11, and reported that he had been hospitalized twice for "hearing a voice that proclaimed I was evil." ASH reports indicated that the hospitalizations were also prompted by "sexual urges." In his interview with Dr. Stark, Holmgren stated that "[i]f I don't do some mental thing the voice said that I will act out in a sexual way and lie to cover up the sexual thing." The doctor also reported that Holmgren "had been experiencing sexual fantasies with young boys for a long time."

In finding that Holmgren's commitment offense involved the use of force or violence, Dr. Stark referred to facts from the probation report indicating that Holmgren had orally copulated and sodomized a 10-year-old boy. The doctor also found that Holmgren "was suffering from symptoms of a severe mental disorder that was a causative factor at the time of the offense." Holmgren told law enforcement that his urge to molest his victim had been brought on by pornography, and stated, "I lowered myself to [the]

very acts that made me lose self-control." He also told the police "that he frequently fantasized [about] having sex with minor males and would likely re-offend." The doctor also found that Holmgren's mental disorder was not in remission, noting that "current documentation and the interview clearly demonstrated the patient evidencing psychotic symptoms and continued pedophilic thought process that has remained unchanged since the controlling offense."

In concluding that Holmgren had received the requisite 90 days of treatment during the year preceding his parole release date, the doctor stated that "[h]e has been prescribed psychotropic medications and offered psychosocial rehabilitation and specific therapy focused on his sexually deviant behavior in individual therapy sessions with a psychologist while he was in prison." Dr. Stark also concluded that Holmgren represented a substantial danger of physical harm to others by reason of a severe mental disorder. The doctor explained: "The patient has demonstrated a severe mental disorder that is long term and chronic and requires comprehensive treatment. Given the patient's propensity for dealing with symptoms of psychosis through sexual violence towards a minor male and his continuing sexual deviant thoughts, it is quite likely that he would continue to use this maladaptive coping mechanism if released into the community."

At the conclusion of the trial, the court found that the prosecution had met its burden of proving that Holmgren met all of the criteria for treatment as an MDO as of the date of the BPT hearing. Accordingly, Holmgren was ordered committed for treatment to the Department of Mental Health as a condition of his parole.

DISCUSSION

The MDO Act allows the state to civilly commit certain prisoners for mental health treatment as a condition of parole. To qualify as an MDO the trial court must find that: 1) the prisoner suffers from a severe mental disorder; (2) the prisoner used force or violence in committing the underlying offense; (3) his severe mental disorder was a cause or an aggravating factor in the commission of the offense; (4) his disorder is not in remission or capable of being kept in remission without treatment; (5)

he was treated for the disorder for at least 90 days in the year prior to parole or release; and (6) because of the disorder he represents a substantial danger of physical harm to others. (§ 2962, subds. (a)-(d).) Holmgren contends the evidence is insufficient to support the court's finding that he received at least 90 days of treatment for his pedophilia during the year prior to his parole release date because (1) the prosecution failed to offer proof as to when he was first diagnosed with the disorder, and (2) the record fails to establish that any of his treatment was intended to address his pedophilia as distinguished from his psychotic disorder. We disagree.

In reviewing the sufficiency of evidence to support an order made in MDO proceedings, we review the entire record to determine if reasonable and credible evidence supports the decision of the trier of fact. (*People v. Clark* (2000) 82 Cal.App.4th 1072, 1082-1083.) In conducting this review, we view the evidence and draw all reasonable inferences therefrom in favor of the order. (*Ibid.*)

Substantial evidence supports the finding that Holmgren received 90 days of treatment for his pedophilia in the year prior to his parole release date, as contemplated by subdivision (d)(1) of section 2962. Contrary to Holmgren's claim, the prosecution was not required to present evidence establishing when he was first diagnosed with pedophilia in order to prove that he received the requisite treatment for the disorder. *People v. Sheek* (2004) 122 Cal.App.4th 1606 (*Sheek*), which Holmgren cites in support of this proposition, is inapposite. In *Sheek*, it was undisputed that the prisoner was first diagnosed with the severe mental disorder giving rise to his MDO commitment (pedophilia) less than 90 days prior to his parole release date. (*Id.*, at p. 1611.) Moreover, there was no indication in the record that the prisoner had ever been treated specifically for pedophilia. (*Id.*, at p. 1609.) The prosecution's offer of proof regarding treatment for pedophilia consisted of the medical expert's opinion that the medication the prisoner took for his depressive disorder (Zoloft) may have lowered his libido and thereby reduced his pedophilic urges. (*Ibid.*)

Here, Drs. Yakush and Stark both stated that Holmgren had received treatment for pedophilia for at least 90 days in the year preceding his parole release date. While Dr. Yakush could not identify the precise date upon which Holmgren was first diagnosed with pedophilia, he testified to his knowledge "that some of the M.D.O. evaluators believed he had pedophilia when they evaluated him in prison." Dr. Yakush also testified that Holmgren's "deviant sexual behavior" had been addressed in individual therapy during the relevant period, and that his pedophilic tendencies were "intertwined" with these behaviors, which included chronic masturbation. In concluding that Holmgren had received treatment that focused on his pedophilia, Dr. Stark stated that he had been "offered psychosocial rehabilitation and specific therapy focused on his sexually deviant behavior in individual therapy sessions with a psychologist while he was in prison." Dr. Stark's review of Holmgren's medical records also led her to note that Holmgren's "continued pedophilic thought process . . . has remained unchanged since the controlling offense." While Holmgren asserts that the deviant sexual behaviors that were addressed during his therapy were not related to his pedophilia, the court had the discretion to accept the doctors' opinions to the contrary. (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) The doctors' opinions in this regard are sufficient to establish that Holmgren was diagnosed with pedophilia while he was in prison and that he received at least 90 days of treatment for that disorder in the year preceding his parole release date.

Holmgren's reliance on *People v. Garcia* (2005) 127 Cal.App.4th 558, is similarly misplaced. In that case, the district attorney sought to continue the prisoner's treatment as an MDO on the basis of a new severe mental disorder (pedophilia) after it was determined that the disorder upon which the initial commitment was based (schizoaffective disorder) was in remission. It was undisputed that the prisoner had no prior diagnosis for pedophilia and that he had never received treatment for the disorder. The court rejected the prosecution's assertion that the prisoner's commitment could be extended on the basis of his treatment for schizoaffective disorder, reasoning that "[t]he mental disorder for which extended involuntary treatment is sought must be the same

mental disorder for which defendant was treated as a condition of his parole. . . . Section 2962, subdivision (c) specifically refers to treatment of 'the' mental disorder, not 'a' mental disorder. Therefore, both the letter and spirit of the statute require the prosecutor to show that the defendant was treated for the same mental disorder for which the extended commitment is sought. [Citation.] The prosecutor did not do that in this case and instead presented evidence of an entirely new mental disorder and therefore a mental disorder for which defendant had never received treatment. Treatment for the severe mental disorder is a prerequisite for an order extending a prisoner's commitment under the MDO Act." (*Id.*, at p. 567.) Here, the prosecution did not purport to base Holmgren's commitment on his schizoaffective disorder or his treatment for that disorder. Rather, the commitment order is solely based upon the diagnosis of pedophilia, and the record is sufficient to support the court's finding that Holmgren received at least 90 days of treatment for that disorder during the year prior to his parole release date.

The judgment (order of commitment) is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Roger D. Randall, Judge*

Superior Court County of San Luis Obispo

Rudy Kraft, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

* (Assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)